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Rec'd 6/23/06
4057 0004

IN THE SECOND JUDICIAL DISTRICT COURT FOR WEBER COUNTY

STATE OF UTAH

PLEASANT VIEW CITY, a municipal corporation, Plaintiff, v. C. E. BUTTERS REALTY & CONSTRUCTION, INC.; TOWERS INVESTMENTS, LLC; TOWERS SAND & GRAVEL, LLC; KENT BUTTERS; AND CRAIG BUTTERS, Defendants.	**MEMORANDUM IN SUPPORT OF MOTION FOR JUDGMENT ON THE PLEADINGS** Civil No. 070906020 Judge W. Brent West

Plaintiff Pleasant View City (the "City") has moved pursuant to Utah R. Civ. P. 12(c) for judgment on the pleadings with respect to its Petition for Declaratory and Other Relief ("Pet. or Petition"). The City submits this memorandum in support of its motion.

INTRODUCTION

Defendants (collectively "Butters" herein) are the owners and operators of a sand and gravel extraction business within the City's corporate boundaries. As the City's Petition describes, this case arises from a long-term dispute about whether and to what extent the City has the authority to regulate Butters' operations as a prior nonconforming use.

Most recently, in consultation with other communities and gravel operators, including one contemplating possible annexation into the City, the City enacted the subject excavation ordinance as Ordinance No. 2005-16 (the "Ordinance"). Butters did not challenge the substance of the Ordinance after the City enacted it; nor did Butters seek judicial review of the validity of the Ordinance in response to the City's Petition seeking its enforcement. Any such challenge is now time barred and analysis of the issues raised by the City's Petition thus collapses into a determination whether the City has authority to regulate Butters' operations and whether such regulation raises constitutional concerns at this juncture.

As it has asserted in the past and by its Answer to the City's Petition here, Butters challenges the City's authority to regulate its operation of the gravel pit as a prior nonconforming use. Butters also asserts the Ordinance is preempted by the State Mining Act, and constitutes a partial or complete regulatory taking. However, Butters' position is incorrect as a matter of law.

The City has long recognized Butters' status as a nonconforming use. The law is well-established and the City does not dispute the general proposition that the nonconforming status of the operation precludes enactment of zoning ordinances which would have the effect of prohibiting the use of the property as a gravel pit. The Ordinance at issue here, however, is not such an enactment.

Rather, the Ordinance in question is an excavation ordinance which regulates the continued use of the property in such a way as to mitigate adverse impacts on neighboring properties and the City as a whole. Butters has not and cannot now challenge the reasonableness of the Ordinance itself as an exercise of the police power, and the nonconforming use status, relied upon so heavily by Butters, does not affect the City's authority and obligation to regulate the operation. Moreover, state mining law is expressly inapplicable and does not preempt local regulation. Application of the Ordinance is not barred by takings concerns because such claims are not ripe for judicial review.

The City therefore respectfully requests that the Court enter judgment that the Ordinance is a valid exercise of the City's regulatory authority and applicable to Butters' operation as a prior nonconforming use. The City further seeks the Court's order that Butters be required to comply with the Ordinance by submitting the required applications which will then allow the parties to develop the factual context necessary to address any potential "as applied' concerns.

STATEMENT OF FACTS DERIVED FROM THE PLEADINGS[1]

1. Butters are the owners and operators of a sand and gravel excavation and processing operation (the "Gravel Pit") located at approximately 1476 West 4300 North, Pleasant View, Utah. See Pet. ¶ 2; Ans. ¶ 2.

2. The City determined the Gravel Pit was in operation prior to the adoption of zoning ordinances which would otherwise prohibit its operation, and recognizes the Gravel Pit as a prior nonconforming use. See Pet. ¶¶ 6-7; Ans. ¶¶ 6-7.

3. In December 2005, the City adopted its amended excavation ordinance, Ordinance No. 2005-16 (the "Ordinance"), which is the subject of the City's Petition herein. See Pet. ¶ 13, Ex. A; Ans. ¶ 13. The Ordinance does not purport to establish zoning designations that would prohibit Butters' operations, but rather provides in pertinent part:

> **Purpose.** It is the purpose and object of this ordinance to establish reasonable and uniform limitations, safeguards, and controls on excavation within the city. These provisions are deemed necessary in the public interest to affect practices which will provide protection of the tax base, provide for the economical use of vital materials

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[1]There are myriad facts, many disputed, surrounding the relationship between the City and Butters. Those facts, however, are immaterial to the Court's evaluation of the Ordinance and their existence does not preclude judgment on the City's Petition based upon the pleadings. *See* Fink v. Miller, 896 P.2d 649, 655 (Utah App. 1995) (summary judgment appropriate despite multiple disputed facts where the facts were immaterial); Burns v. Cannondale Bicycle Co., 876 P.2d 415, 419 (Utah App. 1994) ("the mere existence of genuine issues of fact . . . does not preclude the entry of summary judgment if those issues are immaterial to resolution of the case.").

> necessary for our economy and give due consideration to the present and future use of land in the interest of promoting the public health, comfort, safety, community character and general welfare. It is the primary intent of this ordinance that excavated land be rehabilitated as soon as possible to prevent conditions detrimental to neighboring property and residents, and to provide for the subsequent beautification and beneficial use of the lands affected by excavation.

Pet. at Ex. A; Ans. ¶ 13.

4. Butters did not challenge the substantive "limitations, safeguards and controls on excavation" imposed by the Ordinance within 30 days as required by Utah Code Ann. § 10-9a-801. See Pet. ¶¶ 14 -15; Ans. ¶ 14. Rather, in Answer to the City's Petition, Butters takes the position that it didn't know of the Ordinance, that by virtue of the Gravel Pit's status as a nonconforming use it is "exempt and beyond the authority of [the City] to regulate such," and in any event the City should be estopped from claiming Butters did not timely challenge the Ordinance because of an "express agreement" between counsel to stay all litigation.[2] Ans. ¶ 14.

5. By its Answer, Butters asserts that: 1) the Gravel Pit is a nonconforming use, and thus the City has no delegated authority to regulate the Gravel Pit by the Ordinance (Ans. pp. 5-6); 2) the City's Ordinance is preempted by state or federal law

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[2]Butters' notice and estoppel assertions are immaterial because Butters undisputedly knew of the Ordinance and the City's intention to litigate to enforce its provisions no later than the date the City served Butters with the summons and complaint in this matter. Nevertheless, Butters did not answer or counterclaim seeking judicial review of the Ordinance within 30 days even of that later date. The issues are thus confined to a legal determination whether the City has the authority to regulate Butters' gravel operation.

(Ans p. 7); and the Ordinance is unenforceable because it would take or partially take property without due process. Ans. pp. 7-8.

ARGUMENT

I. BUTTERS FAILED TO TIMELY CHALLENGE THE REASONABLENESS OF THE EXCAVATION ORDINANCE, AND ANY SUCH CLAIM IS NOW TIME BARRED.

The City's decision adopting the Ordinance was a land use decision made pursuant to Utah Code Ann. §§ 10-9a-101 et seq., which provides in pertinent part:

> To accomplish the purposes of this chapter, municipalities may enact all ordinances, resolutions, and rules and may enter into other forms of land use controls and development agreements that they consider necessary or appropriate for the use and development of land within the municipality, including ordinances, resolutions, rules, restrictive covenants, easements, and development agreements governing uses, density, open spaces, structures, buildings, energy efficiency, light and air, air quality, transportation and public or alternative transportation, infrastructure, street and building orientation and width requirements, public facilities, fundamental fairness in land use regulation, considerations of surrounding land uses and the balance of the foregoing purposes with a landowner's private property interests, height and location of vegetation, trees, and landscaping, unless expressly prohibited by law.

Utah Code Ann. §§ 10-9a-102(2). See also Ordinance, § 8.24.010 ("These provisions are deemed necessary in the public interest to affect practices which will provide protection of the tax base, provide for the economical use of vital materials necessary for our economy and give due consideration to the present and future use of land in the interest of promoting the public health, comfort, safety, community character and general welfare.").

Review of that decision is thus subject to section 10-9a-801, which provides in pertinent part:

> (1) No person may challenge in district court a municipality's land use decision made under this chapter, or under a regulation made under authority of this chapter, until that person has exhausted the person's administrative remedies as provided in Part 7, Appeal Authority and Variances, if applicable.
>
> (2) (a) Any person adversely affected by a final decision made in the exercise of or in violation of the provisions of this chapter may file a petition for review of the decision with the district court within 30 days after the local land use decision is final.
>
> . . .
>
> (3) (a) The courts shall:
>
> (i) presume that a decision, ordinance, or regulation made under the authority of this chapter is valid; and
>
> (ii) determine only whether or not the decision, ordinance, or regulation is arbitrary, capricious, or illegal.
>
> . . .
>
> (6) The petition is barred unless it is filed within 30 days after the appeal authority's decision is final.

See Utah Code Ann. § 10-9a-801.

In this case the City's decision adopting the Ordinance was final in December 2005. Judicial review of the City's decision was available, but subject to the express limitations of Chapter 9a. Butters did not challenge the Ordinance within 30 days of December 2005. Nor has Butters challenged the Ordinance within 30 days of the

City's Petition expressly seeking application of the Ordinance to Butters despite Butters' conclusory claim that it believed litigation had been stayed. Review of the reasonableness of the Ordinance as a land use regulation pursuant to chapter 9a is therefore time-barred as a matter of law[3], and determination of the City's Petition collapses into analysis of Butters' threshold legal assertion that the City has no authority to regulate the Gravel Pit simply because it is a prior nonconforming use.

II. THE CITY HAS AUTHORITY TO REGULATE BUTTERS' GRAVEL OPERATION WHETHER OR NOT IT HAS STATUS AS A NONCONFORMING USE.

The essence of Butters' defense to the City's enforcement action is its assertion that:

> Pleasant View City is limited to exercising only those statutory powers expressly granted to them [sic] by the legislature. . . . The Petition and all claims asserted therein are barred as Defendants hold a vested right in an administrative and judicially-determined valid and

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[3]This is true regardless of how the land use decision is characterized. In Foutz v. City of South Jordan, 2004 UT 75, 100 P.3d 1171 the Supreme Court recognized that:

> The Appeals section specifically addresses the appeal of municipal land use decisions made pursuant to the MLUDMA. By requiring the exhaustion of administrative remedies and the filing of a petition for review within 30 days, the provisions of the Appeals section evince a legislative intent to encourage the quick resolution of disputes over land use decisions and to recognize the authority granted to municipal decision-making bodies.

Foutz ¶ 15 at 1175. The court went on to "hold that plaintiffs, as parties seeking redress from a municipal land use decision, were obligated to comply with the requirements of the Appeals section," regardless of the characterization of their claims in that case as an "enforcement" action. Id.

> prior nonconforming use. The Ordinance does not apply to the nonconforming use that Defendants have maintained continuously prior to the time the Ordinance governing the land changed, and Defendants continue to use the property in the same manner that existed prior to Pleasant View City passing the Ordinance. Butters' prior nonconforming use is a vested right that cannot be affected by the retrospective [sic] enactment and operation of an ordinance.

See Ans., at Fourth Affirmative Defense. See also id. at Fifth Affirmative Defense (asserting Ordinance a nullity and beyond authority of 10-9a-101).

In fact, however, in addition to the broad grant of authority to "enact all ordinances, resolutions, and rules and . . . other forms of land use controls and development agreements that they consider necessary or appropriate for the use and development of land within the municipality" in section 10-9a-102, quoted above, the City is granted broad police powers to regulate uses of land within the City. "The municipal legislative body may pass all ordinances and rules, and make all regulations, not repugnant to law, necessary for carrying into effect or discharging all powers and duties conferred by this chapter, and as are necessary and proper to provide for the safety and preserve the health, and promote the prosperity, improve the morals, peace and good order, comfort, and convenience of the city and its inhabitants, and for the protection of property in the city." See Utah Code Ann. § 10-8-84.

Contrary to Butters' assertions, these broad grants of authority allow the City authority to regulate nonconforming uses without a specific reference to such uses. State v. Hutchinson, 24 P.2d 1116, 1121 (Utah 1980) (expressly rejecting Dillon's rule and

holding that "[t]he enactment of a broad general welfare clause conferring police powers directly on [municipalities] was to enable them to act in every reasonable, necessary, and appropriate way to further the public welfare of their citizens."). See also Buhler v. Stone, 533 P.2d 292, 294 (Utah 1975):

> Even the scope of general welfare under the police powers is very broad. In attacking the ordinance as not within the police power, plaintiff argues that that authority of government does not extend to the regulation of appearance and esthetics. It is true that the police power is generally stated to encompass regulation of matters pertaining to the health, morals, safety or welfare. But those are generic terms. The promotion of the general welfare does not rigidly limit governmental authority to a policy that would 'scorn the rose and leave the cabbage triumphant.' Surely among the factors which may be considered in the general welfare, is the taking of reasonable measures to minimize discordant, unsightly and offensive surroundings; and to preserve the beauty as well as the usefulness of the environment.

(footnote omitted).

And nothing about the Gravel Pit's status as a nonconforming use exempts the Gravel Pit from the City's regulatory powers. As commentators have aptly observed:

> While preexisting nonconforming uses may continue to be operated in spite of a zoning ordinance subsequently enacted which prohibits the establishment of new uses of the same kind or new structures of the same bulk or location, such uses generally are not granted immunity from police power regulations governing the manner or operation of use. The police power, being one of the least limitable of governmental powers, often adversely affects or cuts down existing property rights. Subject only to constitutional standards of reasonableness, police power regulation of a certain type of

> land use will likely be upheld, whether the land use involved is a nonconforming use or a conforming use.
>
> For example, although a quarry may have the status of a nonconforming use, it is not protected against public health regulations even though these may involve considerations of aesthetic values. Nonconforming uses are subject to police power regulations, including those designed for the preservation of the environment and protection of ecological values.

4 Rathkopf's The Law of Zoning and Planning § 73:3 (4th ed. 1996) (footnotes omitted).

The rule described derives from the U.S. Supreme Court's decision in Goldblatt v. Town of Hempstead, 369 U.S. 590, 82 S. Ct. 987 (1962). In Goldblatt, the Supreme Court upheld an ordinance regulating a nonconforming excavation business in a manner which essentially put the gravel pit out of operation because it would have cost the operators a million dollars out of pocket to comply with the ordinance. The Court found that the regulation at issue was reasonably related to health, safety, and welfare of the community, and upheld application of the ordinance to the plaintiff's nonconforming use while recognizing that the "ordinance completely prohibits a beneficial use to which the property has previously been devoted." Goldblatt 369 U.S. at 592, 82 S. Ct. at 987. The Goldblatt court further stated that "every regulation necessarily speaks as a prohibition. If this ordinance is otherwise a valid exercise of the Town's police powers, the fact that it deprives the property of its most beneficial use does not render it unconstitutional." Id.

Other courts have considered similar issues. In Dock Watch Hollow Quarry Pit, Inc. v. Township of Warren, 361 A.2d 12 (N.J. App. 1976) aff'd per curiam 361 A.2d 12 (N.J. 1977), the regulation limited a quarry pit's hours of operation, required site reclamation and posting of a bond, and imposed slope restrictions of 1:1 along with terracing and a setback of 50 feet. The Dock Watch court examined the issue of whether a municipality might regulate by excavation ordinance a prior nonconforming use, and concluded:

> [T]he fact that the quarry is a nonconforming use may protect it from later zoning restrictions, [however] its status as such does not render it immune from reasonable regulations pursuant to the police power in the interest of the public health, welfare and safety. Nonconforming uses are clearly subject to such police power regulations, including those designed for the preservation of the environment and the protection of ecological values.

Dock Watch, 361 A.2d at 20.

A more recent case involving a nonconforming sand and gravel operation is Taylor v. Zoning Bd. of Appeals, 783 A.2d 526 (Conn. App. 2001). In Taylor, the gravel pit operator refused to apply for a special permit under the City's excavation ordinance, causing the City to issue a cease and desist order. The Taylor court recognized the protections afforded nonconforming uses, but concluded:

> Regulation of a nonconforming use does not, in itself, abrogate the property owner's right to his nonconforming use. A town is not prevented from regulating the operation of a nonconforming use under its police powers. Uses which have

> been established as nonconforming uses are not exempt from all regulation merely by virtue of that status. It is only when an ordinance or regulatory act abrogates such a right in an unreasonable manner, or in a manner not related to the public interest, that it is invalid.

Taylor at 533. The court expressly held that "the requirement that the plaintiff obtain a permit was a reasonable regulation of its nonconforming use under the Town's police powers." Id. at 534.

In Miller & Son Paving, Inc. v. Wrightstown Township, 401 A.2d 392 (Pa. Commw. Ct. 1979), the plaintiff argued, as does Butters, "apparently quite seriously, that since it has a nonconforming use it has a right to conduct its operations exactly as it did prior to the enactment of the Zoning Ordinance, including the right to continue to quarry without providing a fence." Miller & Son at 393-94. The Pennsylvania court rejected that argument, concluding that the legitimate public safety requirement for fencing did not interfere with any right to carry on the nonconforming use. Id.[4]

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[4]The modern trend in the case law firmly establishes the propriety of regulating nonconforming uses. Rhoda-A-Zalea & 35th, Inc. v. Snohomish County, 959 P.2d 1024, 1030 (Wash. 1998) (reversing appellate court determination that nonconforming user was not subject to subsequently enacted grading permit requirements); Natural Aggregates Corp. v. Brighton Township, 539 N.W.2d 761, 767 (Mich. App. 1995), appeal denied, 552 N.W.2d 178 (Mich. 1996) (noting that "the particular condition of township land from which natural resources are being extracted is a local concern affecting the public health, safety, and welfare of persons and property within a township."); Bernardsville Quarry, Inc. v. Borough of Bernardsville, 608 A.2d 1377, 1380 (N.J. 1992) (concluding that a municipality has authority to regulate and require a license for quarrying occupations and that the regulations did not constitute a taking.)

The Utah Supreme Court has expressly recognized this distinction and has applied a different analysis to ordinances zoning so as to prohibit, as opposed to regulating, a nonconforming use. In Gibbons & Reed Co. v. North Salt Lake City, 431 P.2d 559 (Utah 1967), the Court examined challenges to the enforceability of two zoning ordinances and an excavation ordinance. Gibbons, 431 P.2d at 560. The Court upheld a district court ruling that the zoning ordinances which would have prohibited continued operation of a gravel pit were unenforceable based upon the nonconforming use status of the pit and the diminishing asset doctrine. Id. at 562-65.

Examining the excavation ordinance at issue in that case, however, the Court cited Goldblatt v. Town of Hempstead and commented in pertinent part as follows:

> This excavation ordinance must be examined differently than the zoning ordinance since it is a safety ordinance and nonconforming uses giving owners more freedom from such regulation cannot be established. . . . [¶] We agree that those provisions as they apply to the facts in this case are unreasonable and should not be enforced, but not upon the ground that they are an unconstitutional delegation of power. We hesitate to hold the provisions of the ordinance completely invalid as they might apply to other fact situations since this excavation ordinance illustrates an example where it is impossible or impractical to lay down standards without destroying flexibility necessary to enable the town to carry out the legislative intent. In this case adequate standards must be considered in light of the inherent uncertainties of the subject matter. We find less need to invoke the delegation doctrine in this case where the state has conferred upon this city the power to make ordinances necessary to protect the health, morals and safety of the community, since our concept of representative government is satisfied where the city council who has received the delegation is an elected body. That is the nature of home rule.

Id. at 566 (emphasis added). The Court upheld the district court's decision to deny enforcement of the excavation ordinance in that case, but did so on the grounds that "[t]he respondents have clearly sustained their burden in overcoming the presumption of reasonableness which is with the State in the exercise of the police power." Id.

Applying these principles here, it is clear that the City has the authority to regulate Butters' nonconforming use by Ordinance. Id. ("[T]he state has conferred upon this city the power to make ordinances necessary to protect the health, morals and safety of the community. . ."). While preexisting nonconforming uses may continue to be operated in spite of a zoning ordinance which may prohibit the establishment of new uses of the same kind, Butters' nonconforming use is not granted immunity from police power regulations governing the manner or operation of use.

And unlike the respondents in Gibbons & Reed Co., Butters has not and cannot overcome the presumption of reasonableness afforded the Ordinance. Indeed they have made no effort to do so, relying instead on their arguments that a nonconforming use cannot be regulated in any way. And a reasonableness challenge to the Ordinance is now time barred by the express terms of section 10-9a-801 which is applicable to such a challenge by its terms. Foutz ¶ 15 at 1175 ("[P]laintiffs, as parties seeking redress from a municipal land use decision, were obligated to comply with the requirements of the Appeals section").

III. THE ORDINANCE IS NOT PREEMPTED BY ANY STATE OR FEDERAL LAW.

The only statute or other authority Butters cites in support of its preemption defense is Utah Code Ann. § 40-8-1, et seq. See Ans. p. 7.

While that chapter, known as the "Utah Mined Land Reclamation Act" (see Utah Code Ann. § 40–8-1 (Short Title)), would seem on its face to possibly apply to Butters' Gravel Pit, it expressly does not. Far from preempting local regulation of Butters' operations, the chapter goes on to explicitly provide that: "'[m]ining operation' does not include: the extraction of sand, gravel, and rock aggregate." See Utah Code Ann. § 40-8-4(14)(b). See also Carrier v. Salt Lake County, 2004 UT 98, ¶ 38; 104 P3d 1208 ("We also find it instructive that under Utah's Mined Land Reclamation Act, sand, gravel, and rock aggregate are explicitly excluded from the definition of the term "mineral deposit," and the extraction of sand, gravel, and rock aggregate is explicitly excluded from the definition of the term "mining operation.") (citation omitted).

Butters' federal preemption defense is similarly unsupported and fails to even cite any federal law that preempts a municipality's regulatory authority under the police power. As the Utah Supreme Court has noted: "[Jones v. Rath Packing Co., 430 U.S. 519, 525, 97 S. Ct. 1305, 51 L. Ed. 2d 604 (1977)] specifically states that the police power is such an area traditionally occupied by the states, therefore requiring clear and manifest preemptive language. Where the police power is at issue, there is a presumption that the

regulations can constitutionally coexist, with a resulting burden of proof placed on the party claiming preemption." See Utah Division of Consumer Protection v. Flagship Capital dba Integrated Credit Solutions, 2005 UT 76 ¶¶ 19-20, 125 P.3d 894.

In short, Butters' conclusory assertions fail to carry Butters' burden of proving the City's Ordinance is preempted by any state of federal law.

IV. ANY FACIAL CHALLENGE TO THE ORDINANCE ON CONSTITUTIONAL GROUNDS IS TIME BARRED AND NO "AS APPLIED" CHALLENGE IS RIPE.

Butters asserts in a conclusory fashion that the Ordinance constitutes a taking or partial taking without due process in violation of certain constitutional provisions. See Ans. pp. 7-8. These defenses fail as a matter of law.

"A party can challenge a land use decision as a taking through either a facial challenge or an 'as applied' challenge." Tolman v. Logan City, 2007 UT App 260 ¶ 9, 167 P.3d 489. Butters' has not applied for any excavation permit as required by the Ordinance or complied with any other part or provision of the Ordinance. Therefore, Butters' constitutional takings claims represent a facial challenge. Id. ¶ 10.

"A facial challenge to a land use regulation becomes ripe upon enactment of the regulation itself." Id. ¶ 9 citing Smith Inv. Co. v. Sandy City, 958 P.2d 245, 251 (Utah App. 1998). The Utah Court expressly recognized in Tolman that the statute of limitations period for bringing a facial takings challenge to an ordinance is "just thirty days

following the enactment." Id. citing Utah Code Ann. § 10-9a-801(5). As Butters did not and has not challenged the Ordinance as a facial taking, its takings claims are barred.

To the extent Butters wishes to assert an "as applied" challenge to the Ordinance, the claim must wait application of the specific provisions of the Ordinance to Butters' operations and preliminary decisions by City officials and the City Council. See e.g., Ordinance, § 8.24.040 (describing excavation permit procedures, meeting with Development Review Committee and review by Planning Commission, City Council and ultimately district court), § 8.24.050 (describing hearing process before City Council on modification or revocation of permit) and § 8.24.100 (providing discretion to modify requirements under appropriate circumstances). No such "as applied" challenge is now ripe:

> Under our ripeness rules a takings claim based on a law or regulation which is alleged to go too far in burdening property depends upon the landowner's first having followed reasonable and necessary steps to allow regulatory agencies to exercise their full discretion in considering development plans for the property, including the opportunity to grant any variances or waivers allowed by law. As a general rule, until these ordinary processes have been followed the extent of the restriction on property is not known and a regulatory taking has not yet been established.

See Palazzolo v. Rhode Island, 533 U.S. 606, 620-21,150 L. Ed. 2d 592, 121 S. Ct. 2448 (2001). See also Salt Lake City Mission v. Salt Lake City, 2008 UT 31, ¶¶ 14-17 (citing Palazzolo and upholding dismissal of federal constitutional claims as unripe where developer had failed "to obtain a final, definitive position . . . from the entity charged

with implementing the zoning regulations.").

CONCLUSION

The sole issue properly before the Court at this time is whether the City has authority to exercise its police powers to protect the interests of persons and property within the City by regulating Butters' nonconforming sand and gravel operations. That question can and should be answered in the affirmative as a matter of law. The Ordinance here is a valid exercise of the City's land use and police powers and is applicable to Butters. The City therefore respectfully requests a judgment in its favor on that issue and an order that Butters comply with the ordinance.

DATED this 25th day of April, 2008.

WILLIAMS & HUNT

By _____
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Robert C. Keller
Attorneys for Plaintiff

140196.1

AFFIDAVIT OF SERVICE

STATE OF UTAH)
: ss.
COUNTY OF SALT LAKE)

Shari H. Sampson, being duly sworn, says that she is employed in the law offices of Williams & Hunt, attorneys for Plaintiff Pleasant View City herein; that she served the attached **MEMORANDUM IN SUPPORT OF MOTION FOR JUDGMENT ON THE PLEADINGS** in Case No. 070906020 before the Second Judicial District Court, Weber County, State of Utah, upon the parties listed below by placing a true and correct copy thereof in an envelope addressed to:

Counsel for Defendants
Joseph M. Chambers
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31 Federal Avenue
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and causing the same to be mailed first class, postage prepaid, on the 23rd day of April, 2008.

Shari H. Sampson

SUBSCRIBED AND SWORN TO before me this 23rd day of April, 2008.

Notary Public

NOTARY PUBLIC
DANETTE A. LYON
257 E 200 S Suite 500
Salt Lake City, UT 84111
COMMISSION EXPIRES
SEPTEMBER 11, 2010
STATE OF UTAH